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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

T.B., a minor, ALLISON BRENNEISE and ROBERT BRENNEISE, Plaintiffs, v. SAN DIEGO UNIFIED SCHOOL DISTRICT Defendant.	Case No.: 08 CV 0028 WQH (WMc) (Consolidated with 08 CV 0039)
SAN DIEGO UNIFIED SCHOOL DISTRICT, Plaintiff, v. T.B., a minor, ALLISON BRENNEISE and ROBERT BRENNEISE, STEVEN WYNER and WYNER & TIFFANY Defendants.	OPPOSITION TO SAN DIEGO UNIFIED SCHOOL DISTRICT'S MOTION FOR CERTIFICATION HON. WILLIAM Q. HAYES Place: Courtroom 4, Fourth Floor Date: August 18, 2008 Time: 11:00 a.m. **NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT**

I. THERE ARE NO EXCEPTIONAL CIRCUMSTANCES THAT WOULD JUSTIFY AN INTERLOCUTORY APPEAL IN THIS CASE

As the Ninth Circuit stated in *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982), Congress intended that section 1292(b) be used to permit an interlocutory appeal "only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." Thus, the court made clear that an interlocutory appeal should only be permitted where the issue is "controlling," which is to say that it "may materially advance the ultimate termination of the litigation" so that, at the very least, an interlocutory appeal will "appreciably shorten the time, effort, or expense of conducting a lawsuit" *Id*. Here, there is not the remotest possibility of that occurring because the issues in the successful compliance complaint before the California Department of Education ("CDE Compliance Complaint"), for which the Brenneises' seek attorneys' fees, are completely unrelated to the issues in the administrative due process decision issued by the Office of Administrative Hearings ("OAH Decision") that is the subject of the cross-appeals in this case and that is the primary focus of this litigation.

The OAH Decision deals with whether the IEPs developed during August and December 2006 provided T.B. with a free appropriate public education ("FAPE") during the 2006-2007 school year. The issue in the CDE Compliance Complaint was whether the District implemented the Student's July 17, 2006 IEP during the extended school year (ESY) that preceded the commencement of the 2006-2007 school year. Decl. Steven Wyner. The OAH Decision did not address T.B.'s education during the ESY that preceded the commencement of the 2006-2007 school year. Thus, the claim for reasonable attorneys' fees in connection with the CDE Compliance Complaint is a very minor side issue in the overall context of this litigation.

Because the Brenneises'right to reimbursement for reasonable attorneys' fees incurred in connection with the successful CDE Compliance Complaint has nothing whatever to do with the issues presented by the cross-appeals in this case, an interlocutory appeal will have no positive impact on the overall litigation. Indeed, as discussed below, the effect will be just the opposite – a substantial increase in time and cost for both the parties and the court, which will be forced to deal with simultaneous proceedings in both the district court and the court of appeals, with the potential for a second round in both courts, and a yet a third round of appeals if the Ninth Circuit affirms.

The District's suggestion that an immediate appeal will conserve judicial resources by possibly "avoid[ing] the cost of litigating the amount of fees owed to its conclusion," is a non-sequitor. The test is not whether an interlocutory appeal will promote resolution of the issue to be appealed; the test is whether the interlocutory appeal will promote final resolution of the litigation as a whole. As the Ninth Circuit observed in *United States v. Woodbury*, 263 F.2d 784, 787-88 (9th Cir. 1959), the issue need not be "dispositive of the lawsuit in order to be regarded as controlling" but it cannot be "collateral to the basic issues of [the] case."

In any case, an interlocutory appeal would not even substantially progress the litigation with respect to the claim the District seeks to appeal. The determination of prevailing party status with respect to the CDE Compliance Complaint is hardly difficult or complex. Rather, a quick read of the CDE Compliance Complaint order should be sufficient to determine if the Brenneises prevailed and obtained a meaningful remedy from the CDE.[1] Of course, if this court were to determine that the Brenneises are not the prevailing party with respect to the CDE Compliance Complaint, and award no fees in connection with that proceeding, that would obviate the need for any appeal of this issue at all by the District.

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[1] As reflected in the CDE Compliance Complaint order, the CDE awarded the Brenneises compensatory education in the form of 24 hours of English Language Arts instruction and 80 minutes of APE instruction. Exhibit A.

Should the Brenneises be found to be a prevailing party in the administrative due process proceeding that lead to the OAH Decision, they have the right to seek reasonable attorneys' fees in connection therewith. The determination of an attorneys' fees award in connection with the due process proceeding and/or the CDE Compliance Complaint will require a determination of several issues – such as the prevailing hourly rates, the adequacy of documentation of the billable time, etc. – that are common to both fee awards and will have to be decided by this court regardless of whether there is an interlocutory appeal.

The amount of fees incurred in connection with the CDE Compliance Complaint is under $10,000; a very small fraction of the fees incurred in the due process case. Decl. Steven Wyner. Reviewing some additional billing entries in connection with the CDE compliance proceeding is hardly a significant savings of judicial resources, in the context of the far more significant fee award that may be requested by the Brenneises as prevailing parties in the due process proceeding and these cross-appeals. Thus, it is much more cost effective for the court to make an attorneys' fees award with respect to both claims at the same time.

It would be substantially more burdensome on the court if it were required to revisit the attorneys' fees issue a second time if the Ninth Circuit were to affirm, and substantially more burdensome on the Ninth Circuit to consider three separate appeals (the interlocutory appeal, an appeal of this court's decision on the cross-appeals of the OAH Decision, and attorneys' fees award in connection with the due process proceeding and the pending cross-appeals, and a possible appeal of the ultimate attorneys' fees award in connection with the CDE compliance proceeding after remand) instead of one appeal filed at the end of the proceedings in this case that addresses both the merits and the calculation of any ultimate attorneys' fees award.

If the Ninth Circuit were to reverse the court's order, it would do nothing to promote the conclusion of the litigation as a whole. However, if the Ninth Circuit were to affirm, as in *Gonzales v. Schriro*, 2008 U.S. Dist. LEXIS 45974 (D. Ariz. June 10, 2008), "the interlocutory appeal would have delayed the ultimate termination of this case rather than advanced it." Obtaining any decision from the Ninth Circuit would likely not happen for at least a year and a half to two years, or more[2] – by which time it is very likely that the rest of the issues in this case would have been decided.

An affirmance by the Ninth Circuit would necessitate a remand for further proceedings, including the determination of whether the Brenneisses, in fact, prevailed in the CDE compliance proceeding as well as how much they would be entitled to in attorneys' fees, giving rise to the potential for yet another appeal of that order. Thus, the likely result would be to prolong and complicate the litigation as a whole, and substantially increase the costs associated with the litigation for the parties and the court. As for the District's speculation as to the impact that an immediate appeal would have on the settlement prospects for the overall case, it is as, or more, likely that a pending Ninth Circuit appeal would inhibit, rather than encourage, the possibility of an overall settlement.

II. THERE IS NO SUBSTANTIAL DIFFERENCE OF OPINION ON WHETHER A PREVAILING PARTY IN A CDE COMPLIANCE PROCEEDING IS ENTITLED TO ATTORNEY'S FEES

One of the requirements in section 1292(b) for an interlocutory appeal is that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion." The District cites *APCC Services, Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101 (D.D.C. 2003) for the proposition that this element is met where the court's decision "conflicts with decisions of several other courts." The District asserts that this element is met by virtue of the fact that other courts differ with the Ninth Circuit on whether a CDE compliance proceeding is an "action or proceeding" for purposes of the attorneys' fees provision in the Individuals with Disabilities Education Act, 20 U.S.C. § 1415.

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[2] According to "The Most Frequently Asked Questions of the U.S. Court of Appeals for the Ninth Circuit Clerk's Office," updated on March 5, 2007, in civil cases, it takes approximately 12-20 months from the notice of appeal to when oral argument is scheduled, and most cases are decided within 3 months to a year after oral argument takes place.

The problem is that, as the court in *APCC Services* acknowledged, this factor only applies where the controlling circuit court has not yet ruled on the issue, stating "[t]he industry as a whole would thus benefit from a ruling **from the Court of Appeals.**" *Id*. at 106 (emphasis added). Here, the question as to whether a CDE compliance proceeding is an "action or proceeding" under section 1415 was squarely answered in the affirmative by the Ninth Circuit in *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023 (9th Cir, 2000). Moreover, the Ninth Circuit was not persuaded that anything in *Buckhannon Bd. & Care Home, Inc v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001). required a different conclusion, as it clearly held in *P.N. v. Seattle Sch. Dist No. 1*, 474 F.3d 1165 (9th Cir. 2007). Thus, it doesn't matter how many other circuit courts have reached a contrary conclusion; the Ninth Circuit has conclusively resolved this issue for this circuit and even another Ninth Circuit panel is bound by the court's previous holdings on this issue.

What has not been squarely decided by the Ninth Circuit is whether a CDE compliance order has sufficient "judicial imprimatur" to meet the *Buckhannon* test. This court properly concluded that it does, and the District has not cited a single case that has held to the contrary on the judicial imprimatur issue. Thus, while the District may strongly disagree with the court's conclusion, it has failed to cite a single conflict with another court's decision on this issue. Accordingly, the District has failed to establish that there is "substantial ground for difference of opinion," which the statute requires in order to justify an interlocutory appeal. *Kern-Tulare Water Dist. v. Bakersfield*, 634 F. Supp. 656, 666 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds*, 828 F.2d 514 (9th Cir. 1987).

III. THE DISTRICT'S ARGUMENT AS TO PROMOTING UNIFORMITY OF LAW IS ALSO LACKING IN MERIT

As to the District's argument that certifying this issue would somehow promote "uniformity in the law," first, even if this argument had merit – which it does not – this is not a substitute for the absence of the other statutory factors. Moreover, what Judy Cias fails to mention in her declaration is that parents can and do file compliance complaints without being represented by counsel. This likely explains why, despite the 816 findings of non-compliance identified by Ms. Cias in her declaration, the District cannot cite to a single other pending case in which the issue has been raised. The fact remains, there is no lack of "uniformity" because the Ninth Circuit's decisions in *Lucht* and *P.N.* are sufficient to uniformly establish – at least in this circuit – that a CDE compliance proceeding is an "action or proceeding" for purposes of attorneys' fees under section 1415.

IV. THE DISTRICT'S ELEVENTH AMENDMENT IMMUNITY ARGUMENT IS SIMILARLY LACKING IN MERIT

Finally, the District asserts that it is entitled to an interlocutory appeal because it raised an issue of "Eleventh Amendment Immunity" in its Motion to Dismiss, on which the court failed to rule, and thus "effectively" rejected. The District does not provide a spot cite to the page in its memorandum of points and authorities where the "immunity issue" was supposedly raised, and opposing counsel is unable to find any such argument, despite a close reading of the District's papers. Although it is difficult to decipher the grounds for the District's immunity argument in the absence of the argument itself, presumably, because the claim for attorneys' fees is under the IDEA, the District would be claiming that it has Eleventh Amendment immunity from suit under the IDEA altogether.

As discussed in *J.R. v. Sylvan Union*, 2008 U.S. Dist. LEXIS 18168, 79-80 (E.D. Cal. Mar. 10, 2008):

> "[T]he IDEA contains an express abrogation of sovereign immunity as to suits brought pursuant to it." *Board of Education of Pawling Central School Dist. v. Schutz,* 137 F. Supp. 2d 83, 87 (N.D.N.Y. 2001). Due to states' receipt of federal funds pursuant to the IDEIA (20 U.S.C. § 1411), Congress has explicitly declared that a state cannot invoke Eleventh Amendment immunity from suit for a violation of the IDEIA. 20 U.S.C. § 1403(a) ("A State shall not be immune under the 11th amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter"); see also, § 1403(b) ("remedies both at law and in equity" available against a state to the same extent as available against any other public entity); *Board of Education v. Kelly E.*, 207 F.3d 931, 935 (7th Cir. 2000) (although § 1403(a) of the IDEA "does not use words such as 'consent' or 'waiver,' it is hard to see why that should matter. Congress did what it could to ensure that states participating in the IDEA are amenable to suit in federal court"), *cert. denied,* 531 U.S. 824, 121 S. Ct. 70, 148 L. Ed. 2d 34 (2000); *M.A. ex rel. E.S. v. State-Operated Sch. Dist. of the City of Newark,* 344 F.3d 335, 348 (3rd Cir. 2003) (same).

Thus, the District's assertion of "Eleventh Amendment Immunity" is frivolous.

Moreover, the District has availed itself of the procedures under the IDEA to file its appeal of the hearing office decision in this case, and asserted in its complaint that this court has jurisdiction under the IDEA. The District cannot both avail itself of the IDEA's procedural protections and appeal procedures by filing a federal court complaint against the Brenneises, while at the same time asserting that it is immune from suit by the Brenneises under the IDEA. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 887 n.9 (9th Cir. Cal. 2001) (state entities waived right to invoke defense of sovereign immunity by participating in litigation). Thus, this argument, even if it had been raised by the District, is not sufficient to support certification of an interlocutory order for appeal.

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V. CONCLUSION

An appeal of an interlocutory order on this narrow issue will have no palliative effect on the overall litigation. On the contrary, allowing an interlocutory appeal on this relatively trivial issue will dramatically increase the cost of litigation for the parties, impose an unnecessary and unwarranted burden on the court of appeals, and, assuming the Ninth Circuit affirms, will likely prolong the litigation in this court. Accordingly, the District's motion should be denied.

Dated: August 4, 2008

Respectfully submitted,

Wyner & Tiffany
ATTORNEYS AT LAW

By: /s/ Marcy J.K. Tiffany
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of 18 and that I am not a party to this action. On August 4, 2009, I served this OPPOSITION TO SAN DIEGO UNIFIED SCHOOL DISTRICT'S MOTION FOR CERTIFICATION AND EXHIBIT A on the San Diego Unified School District by serving their counsel of record electronically, having verified on the court's CM/ECF website that such counsel is currently on the list to receive emails for this case, and that there are no attorneys on the manual notice list.

Dated: August 4, 2008 /s/ Marcy J.K. Tiffany